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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. 87-251

OTIS R. BOWEN, SECRETARY OF HEALTH
AND HUMAN SERVICES, PETITIONER

VS.

CHRISTINE RUSSELL

BRIEF OF RESPONDENT CHRISTINE RUSSELL IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER - STATEMENT

Respondent takes issue with Petitioner's characterization in footnote 1 of p. 3 of his Petition for Writ of Certiorari that "...the application forms respondent signed clearly explained that her entitlement to benefits depended on her having an entitled child in her care, and warned her of her obligation to report to the Social Security Administration when she no longer had such a child in her care,..."

To the contrary the application forms contained the language "in your care" but did not explain the regulatory meaning of such phrase. Petition for Writ of Certiorari, 5a. Nor was there any evidence of record that the "in your care" requirements were explained to Mrs. Russell by any social security personnel. Thus, it cannot be said that the "in your care" concept was "clearly" explained in the applications.

SUMMARY OF THE ARGUMENT

The Third Circuit Court of Appeals did apply a test of reasonableness in determining that the position of the Secretary of Health and Human Services was not substantially justified. Though some of the Court's language shows support for a view that if the government's position was not supported by substantial evidence then it cannot be substantially justified, the Court did not adopt that as a per se rule. Rather, it analyzed the case in accordance with the reasonableness test and only afterwards concluded that this was a case where there was such a dearth of evidence to support the Secretary's legal theories that they were not substantially justified.

Furthermore, the legal theories themselves, when scrutinized under the reasonableness test, were found to "clearly offend established precedent." This too justifies the conclusion that the Secretary's position lacked substantial justification.

This approach was not condemned by the congressional criticism of the 1985 House Report cited by the Solicitor General. That criticism sought to prevent a lack of substantial evidence from inevitably leading to an award of counsel fees under the Equal Access to Justice Act. The Third Circuit opinion does not embrace such inevitability.

ARGUMENT

Though certain language in the decision of the Third Circuit seems to say that the Secretary's position was not substantially justified merely because it was not supported by substantial evidence, a scrutiny of the opinion reveals that the reasonableness test which the Solicitor General advocates was the underpinning of the outcome. It just happened that in this case not only was the Secretary's position not supported by substantial evidence, but it was not supported by any of the evidence. Thus, this exemplifies a situation where "reasonableness" as a test for "substantially justified" can be measured in terms of whether there was substantial evidence, or even any evidence, to support the government's position.

To argue that such a case cannot be within the "reasonableness" standard would contradict the views of the Solicitor General as presented in his Petition for a Writ of Certiorari (hereafter "petition"). Some of the congressional remarks referred to in his petition (petition, 6) which renounce portions of the House report accompanying the 1985 reenactment by no means proscribe what has occurred in this case. For example, Senator Grassly in the cited material said:

> ...that where the agency action is found by a Court to be arbitrary and capricious or where there is little or no factual support for the agency action, the government - as a practical matter - has its work cut out for it to prove substantial justification.

131 Cong. Rec. 59993 (daily ed. July 24, 1985 (remarks of Sen. Grassly). And, Rep. Kastenmeir stated:

> I do not understand the committee report to suggest that a finding that an agency action that was not supported by substantial evidence would automatically entitle the prevailing party to fees and expenses or would establish a legal presumption of entitlement to fees.

131 Cong. Rec. 16917 (1985) (remarks of Rep. Kastenmeir). This and the other congressional criticism cited focused on the implication in the House Report that agency action that was not supported by "substantial evidence" inevitably leads to finding the action not "substantially justified." Federal Election Com'n vs. Rose, 806 F.2d 1081, 1090 n.15 (D.C. Cir. 1986). This Third Circuit opinion does not embrace such implication.

Indeed, this decision of the Third Circuit is consistent with the Solicitor General's view that in order for the government to establish that it was substantially justified it "... must show only that an informed judgment would have viewed its arguments as having some substance and a fair possibility of success." Brief for Petitioner in Samuel R. Pierce, Jr. vs. Myrna Underwood, et al., Supreme Court of the U.S., October Term, 1987, No. 86-1512, p. 16. succinctly stated, it was found in this case that the Secretary's position had no substance. The Secretary's legal theories were found untenable and the Third Circuit wrote:

> Since, under any other view of the law, there was no substantial evidence to support a contention that Russell was at fault, we hold the Secretary's position in the recoupment proceeding was not "substantially justified" within the meaning of the EAJA. (emphasis added).

Petition, 142.

That the Court below analyzed the case in the context of the "reasonableness" test and did not, as the government contends, simply find it dispositive that the Secretary's decision on the merits was reversed for lack of substantial evidence, (Petition 8), is evident by the first sentence of the analytical portion of its opinion. That sentence reads "The Secretary bears the burden of presenting a basis for her position in both fact and in law." (Petition, 11a,B). The Third Circuit elaborates by writing that the government must show a reasonable basis in truth for the facts alleged, a reasonable basis in law for the theory it propounds and a reasonable connection between the facts alleged and the legal theory advanced. (Petition, 10a). This expression of the test is not unlike that of other Circuit Courts approved by the government in such cases as Russell vs. National Mediation Board, 775 F.2d 1284, 1289 (5th Cir. 1985); Phil Smidt & Son, Inc. vs. N.L.R.B. 810 F.2d 638, 642 (7th Cir. 1987); and, Pullen vs. Bowen, 820 F.2d 105,108 (4th Cir. 1987).

Despite referring to the legislative history disapproved of by the Solicitor General, and writing that it clarifies the meaning of "substantially justified", the Third Circuit does not reject or denounce the aforementioned "reasonableness" test. Rather, it utilizes it to conclude that in this case the lack of any evidence to support the agency position makes it not substantially justified. It was already settled law that

> The government's burden of showing substantial justification is a strong one and is not met merely because the government adduces "some evidence" in support of its position.

Washington vs. Heckler, 756 F.2d 959, 961 (3rd Cir. 1985); Petition, 10a.

Therefore, rather than rely on the legislative history as a per se rule, the Third Circuit has re-examined the facts and the government's legal theories in accordance with the three-point analysis aforementioned. The Court below showed, point by point, how there was no resonable connection between the facts alleged and the legal theory advanced by the Secretary. It mentioned how the latter sought to support its theory that Christine Russell was at fault by considering only her written applications for benefits. However, the applications could not "be evaluated in isolation" in that such approach ignored the oral advice given by the Social Security representatives. It rejected the Secretary's baseless contention that Mrs. Russell should've perceived an irreconciliable conflict between

Social Security's interpretation of its own requirements as they applied to her "and the otherwise unexplained phrase 'in your care'." Also, it found the Secretary's position to be in direct contradiction of one of his own regulations - that a recipient failing to report an event because of reliance on statements of Social Security personnel is without fault. (Petition, 12a-13a).

Again, it just so happens that such analysis is consistent with there being a lack of substantial evidence to support the Secretary's position. Moreover, the Third Circuit's decision contains an original analysis in that there is no District Court opinion in support of its holding on the merits that the agency action was not supported by substantial evidence. The only District Court opinion is on the counsel fee petition.

Additional indicia of the lower Court's use of "reasonableness" exists in its review of the Secretary's legal argument that a recipient of benefits is charged with knowledge of the regulations. (Petition 14a). This argument was considered in the context of whether the government was able to show a reasonable basis in law for such theory. This theory was evaluated in accordance with the standard that "... a legal position is substantially justified if it relates to an unsettled or close question of law, but not if it clearly offends established precedent." (Petition, 10a).

This standard is found in Washington vs. Heckler, 756 F.2d 959, 961-62 (3d. Cir. 1985), which this writer believes is a

leading Third Circuit case on the application of the Equal Access to Justice Act. It is stated therein that:

> ...there is no per se rule that imposes counsel fees on the government when it loses merely because its legal theory is rejected. If, for example, the case turns on an unsettled or "close question of law", the government usually will be able to establish that its legal theory was 'reasonable', even if it was not ultimately accepted as a legal rule by the courts. When the government's legal position clearly offends established precedent, however, its position cannot be said to be "substantially justified".

This became an acceptable application of the "reasonableness" test in order to evaluate the government's legal theories. It was the test applied by the Third Circuit in the case sub judice.

CONCLUSION

This case is not comparable to Pierce vs. Underwood as the government contends. The Court of Appeals did apply a test of reasonableness in determining that the agency's position was not substantially justified. The Petition for a Writ of Certiorari should be denied.

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